SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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MARY ANNE MCCLOSKEY, as Executrix for the Estate of PATRICK MCCLOSKEY, and MARY ANNE MCCLOSKEY, Individually,

Index No. 190441/12

Plaintiffs,

**DECISION AND ORDER**

- against -

A.O. SMITH WATER PRODUCTS, *et al.*,

Defendants.

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BARBARA JAFFE, JSC:

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Defendant Mario & DiBono Plastering Co., Inc. (Mario & DiBono) moves pursuant to CPLR 4404 for an order setting aside the verdict rendered against it at trial. Plaintiffs oppose.

## I. BACKGROUND

Patrick McCloskey sued defendant Mario & DiBono and other defendants, claiming that exposure to asbestos from products manufactured or used by them or used at their premises caused him to develop and die from mesothelioma. Upon his death on October 16, 2013, his wife, Mary Anne McCloskey, was appointed administratrix of his estate.

As pertinent to this motion, it is undisputed that McCloskey worked as steamfitter at the World Trade Center between 1969 and 1970.

The trial of this action was consolidated with two other actions, *Phyllis Brown, as Administratrix of the Estate of Harry E. Brown, and Phyllis Brown, Individually*, index No. 190415/12, and *Debra Terry, as Administratrix of the Estate of Carl Terry, and Debra Terry, Individually*, index No. 190403/12. A jury trial commenced on November 13, 2013, and a verdict was rendered on March 18, 2014.

The jury was instructed, pursuant to Pattern Jury Instruction 2:275.2, as follows:

> An entity acts with reckless disregard for the safety of others when it intentionally or with gross indifference to the rights or safety of others engages in conduct that makes it probable that injury will occur.

The jury found Mario & DiBono liable for McCloskey's exposure to fireproofing spray applied at the World Trade Center and awarded damages to his estate and to his wife. It absolved three other trial defendants. Of the 27 other entities listed on the verdict sheet, it allocated liability to four as follows: (1) Cleaver Brooks, 10 percent; (2) Dana, 20 percent; (3) Johns-Mansville, 20 percent, and (4) U.S. Minerals, 25 percent, leaving Mario & DiBono with 25 percent. The jury also found that Mario & DiBono had acted recklessly. It awarded McCloskey $4 million for his pain and suffering from May 2012 to his death on October 16, 2013, and his wife $2 million for her loss of consortium.

## II. DISCUSSION

### A. Applicable law

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after trial and direct that judgment be entered in favor of a party entitled to judgment as a matter of

law on the ground that the verdict was not supported by legally sufficient evidence. In order to find that a verdict should be set aside as a matter of law, the court must determine that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]; *Sow v Arias*, 21 AD3d 317 [1st Dept 2005], *lv denied* 5 NY3d 716). A verdict may be set aside as a matter of law when, upon the evidence presented, there is no rational process by which the jury could have found in favor of the nonmoving party, and the court must afford the party opposing the motion every inference properly drawn from the facts presented, which must be considered in a light most favorable to the nonmovant. (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

B. Substantial contributing factor

Mario & DiBono argues that plaintiffs presented no scientific evidence showing that its fireproofing spray caused McCloskey's mesothelioma. It contends that plaintiffs offered evidence only that McCloskey's cumulative exposure to numerous asbestos products during his lifetime was a significant cause of his disease, which does not constitute proof that the fireproofing spray constituted a substantial contributing factor in causing the disease. (Mem. of Law, dated May 22, 2014 [M&D Mem.]).

Plaintiffs deny that the evidence was insufficient, relying on the following:

(1) Testimony that workers at the World Trade Center in the vicinity of the fireproofing spray were being exposed continually to it (Tr. 1482);

(2) A New York Environmental Protection Administration (EPA) publication advising that asbestos-containing fireproofing spray may be harmful and should not be sprayed absent precautions (Tr. 1483-4);

(3) Testimony of Dr. Steven Markowitz that asbestos-containing spray can contribute to an individual's asbestos-related disease, assuming exposure and inhalation of asbestos dust over a period of time (Tr. 1635-36); and

(4) Testimony of Dr. Jacqueline Moline that McCloskey's exposure to Mario & DiBono's fireproofing spray was a substantial contributing factor in causing McCloskey's disease, based on certain hypotheticals presented by plaintiffs (Tr. 2802-3; 2592-2678; 2997-3010).

Plaintiffs also contend that in any event, evidence of McCloskey's cumulative exposure to asbestos-containing dust is sufficient evidence of causation. (Affirmation of Alani Golanski, Esq., dated June 25, 2014 [Golanski Aff.]).

In reply, Mario & DiBono maintains that the evidence referenced by plaintiffs is nonetheless insufficient to sustain the verdict. (NYSCEF 425).

In *Penn v Anchem Prods.*, a jury verdict was upheld on the issue of causation where the plaintiff testified to having been exposed to visible dust while working with asbestos-containing dental liners, in conjunction with expert testimony that the dust "must have contained enough asbestos to cause his mesothelioma." (85 AD3d 475 [1st Dept 2011]; *In re New York Asbestos Litig. [Marshall]*, 28 AD3d 255 [1st Dept 2006] [verdict supported by evidence that plaintiffs were regularly exposed to dust from defendant's asbestos-containing products and expert indicated that dust contained enough asbestos to cause mesothelioma]; *Lustenring v AC&S, Inc.*, 13 AD3d 68 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005] [evidence showed that plaintiffs worked for long periods in clouds of dust raised specifically by manipulating and crushing defendant's products made of asbestos, and expert testimony indicated that such dust was enough to cause mesothelioma]; *Zalinka v Owens-Corning Fiberglass Corp.*, 221 AD2d 830 [3d Dept 1995] [plaintiff testified that he inhaled asbestos dust released from defendant's product, and

expert testified that such inhalation was substantial contributing factor to disease]).

Here too, plaintiffs offered evidence that McCloskey saw and breathed in dust produced when Mario & DiBono sprayed asbestos-containing fireproofing at the World Trade Center, and expert evidence that the exposure was a substantial contributing factor in the development of McCloskey's mesothelioma. Thus, based on the case law in this jurisdiction, Mario & DiBono has failed to sustain its burden of proof on this motion.

C. Recklessness

Mario & DiBono denies that plaintiffs presented the jury with sufficient evidence that it was reckless in its use of the fireproofing spray, or that plaintiffs offered any state-of-the-art evidence that it knew of the danger of asbestos when McCloskey was exposed. Rather, it relies on evidence establishing that it was hired to apply fireproofing spray designated by others for use at the World Trade Center, that it applied the spray in accordance with directives including how to protect employees and others, and that it switched to a non-asbestos-containing fireproofing spray once it was available. It also denies that the evidence presented was sufficient to impute knowledge to it that exposure to low levels of the spray by bystanders like McCloskey could cause harm. (M&D Mem.).

Plaintiffs assert that the evidence demonstrated Mario & DiBono's awareness of the dangers of asbestos and of the potential harmful effect of the spray on workers, including those within 100 feet of the spraying, that it provided its own workers with protective equipment but failed to supply it to anyone else, and that it was aware that its spray was migrating to other parts of the building, thereby exposing other workers. They also rely on evidence that although Mario & DiBono was directed to take safety precautions to protect other trades in the building, and

despite being advised that the spray constituted a hazard to those working in the building, and notwithstanding the numerous violations issued it by various authorities relating to the hazards of the spraying, Mario & DiBono failed to take the prescribed precautions, and that by the 1960s, it was well known that breathing dust containing asbestos could cause health problems, including cancer, even for those people who did not work directly with the asbestos-containing product. Plaintiffs thus assert that Mario & DiBono has failed to prove that the jury could not have found it reckless by any valid line of reasoning. (Golanski Aff.).

In reply, Mario & DiBono reiterates its arguments, adding that there was no evidence that McCloskey was exposed on the few occasions that it did not follow safety protocols. (NYSCEF 425).

A party may be found to have acted recklessly or in reckless disregard when "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" and "has done so with conscious indifference to the outcome." (*Matter of New York City Asbestos Litig. [Maltese]*, 89 NY2d 955 [1997]). In *Maltese*, the Court applied the gross negligence standard it adopted in motor vehicle cases, and held that although the evidence proved that the defendant was generally aware "that exposure to high concentrations of asbestos over long periods of time could cause injury," it was insufficient to prove that the defendant could have warned the plaintiff-workers when they were at risk. (*Id.* at 957). Here, by contrast, plaintiffs proved not only that Mario & DiBono was generally aware of the dangers of exposure to asbestos over time, but also that it could have, but failed, to warn McCloskey at the time he was at risk.

Similarly, the Appellate Division, First Department, recently upheld a verdict finding that

a general contractor acted recklessly, relying on evidence of the contractor's actual knowledge of the dangers of asbestos and that asbestos was being used at its work sites. It thus found that the jury rationally concluded that it should have been at least obvious to the contractor that by permitting the use of asbestos, it was "highly probable that harm would follow." (*In re New York City Asbestos Litig. (Konstantin)*, AD3d , 2014 NY Slip Op 05054 [1st Dept 2014]; *see also Hamilton v Garlock, Inc.*, 96 F Supp 2d 352 [SD NY 2000] [evidence supported recklessness finding as it showed that defendant sold asbestos products without warnings despite knowledge that serious and potentially deadly harm was almost certain to follow]; *In re Asbestos Litig.*, 986 F Supp 761 [SD NY 1997] [upholding jury's finding of reckless conduct as evidence showed that defendant sold products without warnings and promoted use of asbestos at same time it had acknowledged internally that its employees should be wearing respirators to avoid exposure]; *In re New York City Asbestos Litig. [D'Ulisse]*, 16 Misc 3d 945 [Sup Ct, New York County 2007] [upholding jury's finding of recklessness based on evidence that defendant knew of lethal nature of asbestos but nevertheless failed to place warning on its products with which plaintiffs worked]).

Here too, evidence was presented demonstrating that Mario & DiBono knew that its spray could be hazardous to the health of all workers, that it knew that the spray was being applied in a manner that exposed other workers to it, and that despite being specifically warned repeatedly to take safety precautions to prevent such exposure and being issued violations upon its failure to do so, it took no proper precautions. Mario & DiBono has thus failed to demonstrate that no valid line of reasoning and permissible inferences could have possibly led the jury to find that it had acted recklessly based on the evidence presented at trial.

D. Apportionment

Mario & DiBono argues that the jury's allocation of fault is against the weight of the evidence, in light of proof of McCloskey's lifetime exposure to numerous asbestos-containing products in the course of his and his father's employment, and that the duration of McCloskey's exposure to its spray constituted less than one percent of his lifetime exposure to asbestos. It also contends that the jury erred in failing to allocate liability to companies which McCloskey identified as having produced or sold asbestos-containing products with which he worked directly, whereas he was only a bystander when exposed to its spray.

Relying on the testimony of its experts that McCloskey's exposure to the spray was not a significant or substantial contributing factor to his mesothelioma, and given plaintiffs' expert's testimony that McCloskey's cumulative exposures to all of the asbestos-containing products constituted a substantial contributing factor, Mario & DiBono thus asserts that the jury's allocation to it and the spray's manufacturer of 50 percent of the fault is against the weight of the evidence. It also observes that McCloskey testified that he never saw warnings on any of the furnished products to which he was exposed, and that in summing up, plaintiffs' counsel argued that the jury should find the other companies liable. (M&D Mem.).

Plaintiffs maintain that Mario & DiBono does not meet its burden of proving that the jury's allocation is against the weight of the evidence. (Golanski Aff.). In reply, Mario & DiBono reiterates its arguments. (NYSCEF 425).

At trial, the defendant bears the burden of establishing the equitable shares attributable to the settling defendants or nonparties in order to reduce the amount of its responsibility. (*Zalinka v Owens-Corning Fiberglass Corp.*, 221 AD2d 830 [3d Dept 1995]; *Bigelow v Acands, Inc.*, 196

AD2d 436, 438 [1st Dept 1993]). As the trial defendant in *Zalinka* failed to offer evidence that the settling defendants gave no warning or that a settling defendant's warning was inadequate, the Court upheld the verdict holding the trial defendant solely responsible for the plaintiff's injuries. (221 AD2d 830).

Here too, while McCloskey testified that he worked with the products of other companies during his career, Mario & DiBono has not demonstrated that it met its burden at trial of establishing that the other companies negligently failed to provide an adequate warning of the dangers of asbestos or that such a failure was a substantial contributing factor in causing McCloskey's disease. Consequently, McCloskey's testimony that he saw no warnings on any of the products does not satisfy Mario & DiBono's burden of proof on the issue. (*See eg Zalinka*, 221 AD2d 830 [plaintiff's testimony that he never saw warnings on asbestos products of settling defendants, without more, did not compel jury to conclude that there were no warnings]; *Konstantin*, 2014 NY Slip Op 05054 [apportionment of 99 percent of liability to trial defendant not against weight of evidence where defendant adduced no evidence that some 32 entities negligently failed to warn him of dangers of exposure to asbestos]).

Plaintiffs' summation remarks do not constitute an admission. (*See Rahman v Smith*, 40 AD3d 613 [2d Dept 2007] [denying motion to set aside verdict in automobile collision case where defense counsel told jury at summation that he believed jury would find both plaintiffs and defendant liable and jury found defendant not liable; statement represented counsel's opinion of evidence and jury free to adopt or reject it]).

In any event, having been found reckless, Mario & DiBono is liable for the full amount of the verdict, regardless of apportionment. (CPLR 1601; 1602[7] [limitation on liability

inapplicable to party found to have acted with reckless disregard for safety of others]; *In re Eighth Judicial Dist. Asbestos Litig.*, 92 AD3d 1259 [4th Dept 2012] [although jury apportioned five percent liability to defendant, as it was found to have acted recklessly, its liability not limited to five percent]).

E. Remittitur

1. Pain and suffering

Mario & DiBono asserts that as the award of $4 million for McCloskey's 17 months of pain and suffering deviates materially from other awards, it should be reduced, and that McCloskey's approximately 40-year history of smoking cigarettes warrants an additional reduction. (M&D Mem.).

Plaintiffs argue that an award should be reduced only if it deviates materially from reasonable compensation and should be upheld if it is in the general range of what may be reasonable. They observe that McCloskey endured almost two years of agony, pain and suffering, and loss of dignity. (Golanski Aff.).

In reply, Mario & DiBono observes that trial and appellate courts have substantially reduced pain and suffering awards for asbestos victims, even where the plaintiffs suffered longer than McCloskey, or were alive at the time of trial and were expected to continue suffering. (NYSCEF 425).

Pursuant to CPLR 5501(c), the court may review a money judgment to determine whether it is excessive or inadequate and whether a new trial should be granted absent a stipulation otherwise. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation." (Siegel, NY Prac § 407 [5th ed] [2014]).

In deciding whether an award deviates materially from reasonable compensation, courts must look to awards upheld in similar cases, "bearing in mind that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification." (*Reed v City of New York*, 304 AD2d 1 [1st Dept 2003], *lv denied* 100 NY2d 503). The amount of damages awarded for a personal injury is generally and primarily a jury question, "which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony." (*Ortiz v 975 LLC*, 74 AD3d 485 [1st Dept 2010]).

Most recently, in *Konstantin*, the Appellate Division, First Department, upheld the remittitur of an award of pain and suffering to one plaintiff who died from mesothelioma to an amount equivalent to $136,000 per month of pain and suffering for 33 months, and to another plaintiff to an amount equivalent to approximately $200,000 per month for 27 months of pain and suffering. (2014 NY Slip Op 05054). The trial court had reduced one of the past pain and suffering awards from $7 million to $4.5 million (*Konstantin v 630 Third Ave. Assocs.*, 37 Misc 3d 1206[A], 2012 NY Slip Op 51905[U] [Sup Ct, New York County 2012]), and another from $16 million to $5.5 million (*Matter of New York City Asbestos Litig. [Dummitt]*, 36 Misc 3d 1234[A], 2012 NY Slip OP 51597[U] [Sup Ct, New York County 2012]).

In *Penn v Anchem Prods.*, the Appellate Division, First Department, reduced an award to a mesothelioma victim for 13 months' past pain and suffering from $3.65 million to $1.5 million, which is the equivalent of approximately $115,000 per month. (85 AD3d 475 [1st Dept 2011]). In *Lustenring v AC & S, Inc.*, it upheld the remitttur of jury awards for past pain and suffering of $5 million each to approximately $4.5 million for 17 months, representing $265,000 per month,

and $3 million for 18 months, representing approximately $175,000 per month. (13 AD3d 68, 69 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]). And in *Matter of New York Asbestos Litig. (Pride)*, it found that the past pain and suffering awards of $8 million and $7 million deviated materially from reasonable compensation, and reduced them to $3 million each; however, there is no indication of the months of suffering at issue. (28 AD3d 255 [1st Dept 2006]).

Similarly, a federal trial court upheld jury awards of $4 and $5 million for 32 months of pain and suffering, the equivalent of approximately $125,000 and $150,000 per month, respectively (*Hamilton v Garlock*, 96 F Supp 2d 352 [SD NY 2000]), and in *Consorti v Armstrong World Indus., Inc.*, it remitted the award from $12 million to $5 million, based on 32 months of suffering, or approximately $150,000 per month (9 F Supp 2d 307 [SD NY 1998]).

Another justice of this court upheld an award of $10 million for past pain and suffering, representing approximately $300,000 per month of pain and suffering. (*In re New York City Asbestos Litig. [D'Ulisse]*, 16 Misc 3d 945 [Sup Ct, New York County 2007]). And another sustained jury verdicts of $8.5 million for two years of pain and suffering, or approximately $350,000 per month, and $6.5 million for four to six months of pain and suffering, approximately $1 million per month. (*In re New York City Asbestos Litig. [Koczur]*, Sup Ct, New York County, Dec. 6, 2011, Shulman, J., index No. 122340/99]; *see also Matter of New York City Asbestos Litig.*, 173 Misc 2d 121 [Sup Ct, New York County 1997] [reducing awards as follows: (1) from $2.7 million to $1.5 million based on 12 months of pain and suffering, equivalent to $125,000 per month; (2) from $3 million to $1.5 million based on 11 months of pain and suffering, equivalent to $136,000 per month; (3) from $2.5 million to $1 million based on 9 months of pain and suffering, equivalent to approximately $111,000 per month; (4) from $2 million to $600,000

based on four months of pain and suffering, equivalent to $150,000 per month; and (5) from $2.5 million to $900,000 based on 7.5 months of pain and suffering, equivalent to $120,000 per month]).

Here, the jury's award of $4 million for 17 months of pain and suffering is approximately $235,000 per month. Although smaller awards have been given, in light of *Lustenring*, *D'Ulisse*, and *Koczur*, Mario & DiBono has not shown that the award here deviates materially from what would be reasonable compensation for McCloskey's injury.

Finally, Mario & DiBono offers no authority for the proposition that McCloskey's smoking history warrants a reduction in his pain and suffering award, as he suffered from mesothelioma, not lung cancer. (*See Koczur*, Sup Ct, New York County, Dec. 6, 2011, Shulman, J., index No. 122340/99]).

2. Loss of consortium

Mario & DiBono argues that Ms. McCloskey's award deviates materially from other similar awards, and requests a reduction to $250,000. (M&D Mem.).

Plaintiffs deny that the award deviates materially, and contends that the evidence demonstrates that Ms. McCloskey always depended on her husband's physical, emotional, and household assistance, as well as his love and companionship. (Golanski Aff.).

In reply, Mario & DiBono again argues that the amount awarded Ms. McCloskey is much larger than awards permitted by the courts in recent cases. (NYSCEF 425).

> The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more . . . the mental and emotional anguish caused by seeing a healthy, loving companionable mate turned into a shell of a person is real enough . . . The loss of companionship, emotional support, love, felicity and sexual relations are real injuries . . .

> There may not be a deterioration in the marital relationship, but it will certainly alter it in a tragic way.

(*Millington v Southeastern Elev. Co.*, 22 NY2d 498 [1968]).

A review of the pertinent case law reflects that the award for loss of consortium, here 50 percent of the estate's award for pain and suffering, and at an amount equivalent to approximately $117,000 per month, deviates materially from other awards. In *Didner v Keene Corp.*, the trial court reduced an award of $1.5 million for 27 months of lost consortium to $500,000, where the decedent's award for pain and suffering was $3,650.000. (1990 WL 10626462 [Sup Ct, New York County 1990], *affd* 188 AD2d 15 [1993], *affd as mod* 82 NY2d 342). There, as here, the spouse testified that her marriage was happy, that her husband was her best friend, that she depended upon him emotionally during the marriage, and that she became a nurse to a complete invalid and witness to his pain and suffering.

Similarly, in *Penn*, the court reduced the jury's loss of consortium award from $1,670,000 to $260,000. (85 AD3d 475-476). The record in that case reflects that the award covered 13 months of the loss of consortium, and that defendant argued, pursuant to *Didner*, that the award should be reduced to $20,000 per month of lost consortium. (2009 WL 9056677). The Appellate Division apparently agreed. (85 AD3d 475).

In *Lustenring v AC&S, Inc.*, the loss of consortium award was reduced from $1.5 million to $750,000, for 17 months or approximately $44,000 per month. (13 AD3d at 69; *see also Caruolo v A C & S, Inc.*, 1999 WL 147740 [SD NY 1990], *affd in part and vacated on other grounds* 226 F3d 46 [2d Cir 2000] [lost consortium award of $500,000 representing 75 months, or approximately $6,500 per month]; *but see Koczur* [$1.9 million for lost consortium reduced to

$500,000 for four to six months, or approximately $83,000 per month]; *Martin v A C & S, Inc.*, Sup Ct, New York County, Kornreich, J., index No. 100016/1999 [$18 million for about six years of pain and suffering, $7 million for lost consortium, equaling approximately $100,000 per month]).

In other cases, courts have reduced awards to amounts representing between 10 to 25 percent of the main pain and suffering award. (*See Matter of New York City Asbestos Litig. [Maltese]*, 225 AD2d 414 [1st Dept 1996], *affd* 89 NY2d 955 [1997] [granting judgment of approximately $300,000 for pain and suffering and approximately $38,000 for loss of consortium]; *In re Joint Eastern and Southern District Asbestos Litig. [McPadden]*, 789 F Supp 925 [ED NY 1992], *revd on other grounds* 995 F2d 343 [2d Cir 1993] [loss of consortium award of $400,000 upheld based on pain and suffering award of $4.5 million, and another loss of consortium award of $365,000 based on main award of $1.25 million]; *D'Ulisse*, 16 Misc 3d 945 [court upheld awards of $10 million for pain and suffering and $2.5 million for loss of consortium]).

Based on the foregoing, Ms. McCloskey's loss of consortium award is reduced to $340,000.

F. Consolidation

Mario & DiBono asserts that consolidation of the three cases here was improper and caused juror confusion, resulting in an irrational verdict. It cites in support the numerous defendants, some of which were in only one case, the differing legal theories of liability, plaintiffs' alleged exposures to the products of many companies, the multiple and varied job sites and different occupations, and their exposures at different times and in different manners, all of

which resulted in an unnecessarily long trial with evidence that overwhelmed and confused the jury. It alleges that the jury evinced confusion by failing to apportion liability against most of the companies that manufactured products to which McCloskey was exposed and by finding that Mario & DiBono was reckless notwithstanding the absence of evidence. (M&D Mem.).

Plaintiffs deny that the jury was confused by the consolidated cases, and allege that Mario & DiBono fails to show an example of it and that the court gave numerous and careful instructions to the jury before and during the trial and in the interrogatories and verdict sheets. (Golanski Aff.). In reply, Mario & DiBono reiterates its prior arguments. (NYSCEF 425).

Having found Mario & DiBono liable here but not in *Brown* indicates that the jury differentiated between the two plaintiffs' cases and considered the legal theories presented and evidence at issue in each. The jury's ability to comprehend the issues is also demonstrated by its apportionment of liability in each of the three cases and differing awards of pain and suffering and loss of consortium.

Limiting and explanatory instructions were regularly given, as were reminders about the relevance of certain witnesses or evidence to a specific plaintiff or plaintiffs, and the jurors were given notebooks for note-taking. With the final charge, the jury was read and given a copy of the plaintiff-specific interrogatories, which explicitly set forth what charge or question applied to which plaintiff or plaintiffs, along with separate verdict sheets. (*See Konstantin*, AD3d , 2014 NY Slip Op 05054 [1st Dept 2014] [jury confusion minimized by limiting, explanatory, and curative instructions, juror notetaking, plaintiff-specific interrogatories, separate verdict sheets]).

That the jury apportioned no liability to some nonparty entities or that it found Mario & DiBono reckless does not reflect confusion, but resulted from Mario & DiBono's failure to

satisfy its burden of proving the equitable shares attributable to the nonparty entities (*supra*, II.D.), and the evidence in support of the recklessness finding (*supra*, II.C.). Mario & DiBono has thus failed to establish that consolidation was improper or that it prejudiced its right to a fair trial. (*See Konstantin*, AD3d , 2014 NY Slip Op 05054 [verdicts supported conclusion that consolidation was proper as jury found different defendants liable in two cases, showing that it was able to distinguish between evidence in each case, and rendered different awards]).

III. CONCLUSION

Acc

ordingly, it is

ORDERED, that defendant Mario & DiBono's motion to set aside the verdict is granted only to the extent of remanding the matter for a new trial solely on the issue of damages for loss of consortium unless plaintiffs, within 30 days of service on them of a copy of this order with notice of entry, stipulate to reduce the award for loss of consortium from $2 million to $340,000, and to entry of a judgment in accordance therewith.

ENTER:

Barbara Jaffe, JSC

DATED: August 29, 2014
New York, New York

BARBARA JAFFE
J.S.C.